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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 26547-1-III

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

84187-0

KITTITAS COUNTY and CENTRAL WASHINGTON HOME
BUILDERS ASSOCIATION, et al,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, et al,

Respondents,

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PETITIONERS/APPELLANTS**

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Original

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INTRODUCTION

Pacific Legal Foundation respectfully submits this amicus brief in support of Petitioners Kittitas County, Building Industry Association of Washington, Central Washington Home Builders Association, and Mitchell Williams d/b/a MF Williams Construction Co., Inc. This appeal raises a question regarding the authority of the Growth Management Hearings Boards. In reviewing a challenge to the rural element of Kittitas County's comprehensive plan update, the Eastern Washington Growth Management Hearings Board adopted a presumption that any rural density more intense than 1 dwelling per 5 acres is prohibited under the Growth Management Act (GMA). Based on this presumption, the Board closely scrutinized the County's decision to include two rural densities that allowed 1 dwelling per 3 acres and, as a result, concluded that the County's designation did not comply with the GMA. The Board's decision ignores our Supreme Court's recent opinions in *Thurston County v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358 (2008), and *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129 (2005), and should be reversed.

ISSUE ADDRESSED BY AMICUS

1. Whether *Thurston County* forbids Growth Boards from applying increased scrutiny to a county's determination of appropriate density requirements.

Yes. Growth Boards lack the authority to adopt and apply bright-line rules establishing the maximum allowable density. *Thurston County v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358 (2008).

ARGUMENT

I

THE GROWTH BOARD'S DECISION ADOPTING A PRESUMPTION REGARDING PERMISSIBLE RURAL DENSITIES VIOLATES THE GMA

Kittitas County's comprehensive plan included two rural land use designations that allowed a density of one dwelling unit per 3 acres in the rural area. *Kittitas County Conservation Coalition v. Kittitas County*, EWGMHB No. 07-1-0004c at 7 (Aug. 20, 2007) (*KCCC*).¹ Petitioners Kittitas County Conservation Coalition, RIDGE, and Futurewise (collectively "KCCC") filed a petition challenging the designations, arguing that Growth Board decisions have found that the maximum rural density allowable under

¹ Note regarding citation to Growth Board decisions. The pagination of Growth Board decisions is inconsistent on the Board's website (www.gmhb.wa.gov) and on Westlaw. Where Westlaw provides pagination, this brief will cite to the Westlaw page number. Where Westlaw does not paginate the decision, this brief will cite to the page number on the original Growth Board decision.

the GMA is one dwelling unit per 5 acres. *KCCC*, EWGMHB No. 07-1-0004c at 7-8. *KCCC* argued that because two of the County's rural areas allowed density more intense than one dwelling per 5 acres, the designations were presumptively invalid and the County was required to include a written record justifying its decision to include these areas in its rural element. *KCCC*, EWGMHB No. 07-1-0004c at 7-8. The Growth Board agreed, upholding the petition and concluding that the County did not justify its designation of the challenged rural densities in the record. *KCCC*, EWGMHB No. 07-1-0004c at 16, 21-22.

Kittitas County, Building Industry Association of Washington, Central Washington Home Builders Association, and Mitchell Williams d/b/a MF Williams Construction Co., Inc., appealed, arguing that the Growth Board violated the GMA by improperly applying a "bright-line" rule contrary to the Supreme Court's recent opinions in *Thurston County* and *Viking Properties*. See County Opening Br. at 19-22; BIAW Opening Br. at 9-13. *KCCC* responded that the Growth Board should be able to rely on its prior decisions to establish an evidentiary presumption that certain densities are invalid under the GMA, so long as the Board does not refer to its density standards as "bright-line" rules. See *KCCC* Resp. Br. at 23-26. The County and BIAW have adequately addressed the Supreme Court's treatment of "bright-line" rules in *Thurston County* and *Viking Properties*, but another question was not addressed. How should this Court treat a Growth Board

decision that claims to eschew “bright-line” rules, while at the same time concluding that certain rural densities are, in all instances, prohibited by the GMA?

The answer is clear. *Thurston County* did not simply invalidate the phrase “bright-line rule;” it invalidated a Board practice of adopting standards and imposing burdens not found in the GMA. “We hold that a GMHB may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.” *Thurston County*, 164 Wn.2d at 359. “Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case.” *Id.* The Board’s determination is subject to a presumption of validity and broad deference that is afforded to local government decisions by the GMA. RCW 36.70A.320; RCW 36.70A.3201. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 2333-34, 238 (2005).

A. The Growth Boards’ Authority Are Specifically Limited Under the GMA

The Growth Boards have limited authority and must review a petition for review under the standards set forth in the GMA. The Legislature established the Growth Management Hearings Boards to decide whether appeals of actions taken by local governments comply with the GMA. See RCW 36.70A.250-.280; William Nielsen, et al., *Practice and Procedure Before the Growth Planning Hearings Boards*, 16 U. Puget Sound L. Rev.

1323, 1324 (1993). The Growth Boards engage in quasi-judicial review of GMA petitions within the framework of Washington's Administrative Procedures Act, Ch 34.50 RCW. See RCW 36.70A.270(7); WAC 242-020020(1); Nielsen, *supra*, 16 U. Puget Sound L. Rev. at 1324. As quasi-judicial agencies, the Growth Boards "lack[] the power to make bright-line rules regarding maximum rural densities." *Thurston County*, 164 Wn.2d at 358-59.²

The Legislature, when enacting the GMA, adopted a presumption that a comprehensive plan update is "valid upon adoption." RCW 36.70A.320(1); RCW 36.70A.3201; Nielsen, *supra*, 16 U. Puget Sound L. Rev. at 1325. The GMA emphasizes local governments' discretion to balance the Act's goals and local circumstances. *Quadrant*, 154 Wn.2d at 236-37 (Local government retains "broad discretion in adapting the requirements of the GMA to local realities."); see also RCW 36.70A.320; RCW 36.70A.3201; WAC 365-195-010(3) (The GMA "process should be a 'bottom up' effort . . . with the central locus of decision-making at the local level."). It is this "balancing that the County is entitled to engage in with its local circumstances in mind; and

² See also *Viking Properties*, 155 Wn.2d at 129 (The Growth Boards "are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute."); Jared B. Black, *The Land Use Study Commission and the 1997 Amendments to Washington State's Growth Management Act*, 22 Harv. Envtl. L. Rev. 559, 572 (1998) (The growth boards are not authorized to engage in rulemaking or other quasi-legislative activities.).

a balancing to which the Board must give the County considerable deference.” *Clallam County v. Western Washington Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 139 (2005).

In light of the presumption of validity and broad discretion given to local government, the Legislature placed the burden on the petitioner “to demonstrate that an action taken by [local government] is not in compliance with the requirements of [the GMA].” RCW 36.70A.320(2). The Growth Boards are instructed to find compliance unless the petitioner meets its burden of proving that the GMA regulation was “clearly erroneous.” RCW 36.70A.320(3). The GMA does not authorize the Growth Board to adopt any contrary presumptions or establish new requirements. RCW 36.70A.320; RCW 36.70A.3201; *see also Quadrant*, 154 Wn.2d at 238.

**B. The Growth Boards Adopted a Series of
Bright-line Rules Setting Policy Standards
for Acceptable Maximum Rural Densities**

It is necessary to look at the history and development of the Growth Boards’ “bright-line” rules in order to understand the context in which the KCCC Growth Board applied a presumption of invalidity to Kittitas County’s rural densities. Despite their limited authority, the Growth Boards have had “a major impact” on local governments’ planning discretion under the GMA. Samuel W. Plauch, et al., *Road Map to the Revolution: Guide to Procedural Issues Before the Growth Management Hearings Boards*, 23 Seattle U. L. Rev. 71, 74 (1999). Early commentators noted that the intentionally vague

and inconsistent language contained in the GMA resulted in Growth Board decisions attempting to resolve uncertainties about the “meaning and effect of important and controversial elements of [the GMA].” Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 881, 932 (1993). Key planning concepts, such as what constitutes “urban” versus “rural,” were only generally described by the GMA³, which left it up to the growth boards to interpret and “mold” the Act’s vague statutory provisions. Plauch, et al., *supra*, 23 Seattle U. L. Rev. at 75.

Since 1995, the Growth Boards have applied “bright-line” standards to delineate “urban” versus “rural” densities, which were first adopted in *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, 1995 WL 903165 (Oct. 6, 1995). *Thurston County*, 164 Wn.2d at 358. The Boards explained that the “bright-line” rules were intended to limit local governments’ broad planning discretion under the GMA. *See, e.g., City of Gig Harbor v. Pierce County*, CPSGMHB No. 95-3-0016, 1995 WL 903183, at *22 (Oct. 31, 1995) (explaining circumstances where the Central Board had adopted “the device of a bright line to indicate to local governments the range within which discretion may be exercised” particularly regarding maximum rural density).

³ RCW 36.70A.030(15), (17); Nielsen, *supra*, 16 U. Puget Sound L. Rev. at 1324 (“[S]everal provisions of the GMA were the product of painful and acrimonious debate and were less than models of clarity.”).

Specifically, the Central Growth Board explained that it had adopted its “bright-line” standards to “fill in” areas of the GMA that the Legislature had intentionally left to the discretion of local governments. *See Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068c, 1996 WL 734917, at *4-*9 (Mar. 12, 1996). The Board did not apply its “bright-line” rules as a mere guideline or evaluative criteria for review. Rather, the Board applied its “bright-line” rules to impose an “increased scrutiny” standard on local government under which any density that departs from the Board’s standards will rarely be approved. *Sky Valley*, CPSGMHB No. 95-3-0068c, 1995 WL 903183, at *8-*9; *Vashon-Maury v. King County*, 95-3-0008c, 1995 WL 903209, at *70 (Oct. 23, 1995).

In 2005, our Supreme Court concluded that the Growth Boards do not have authority to adopt or impose such rules:

. . . the growth management hearings boards do not have authority to make “public policy” even within the limited scope of their jurisdictions, let alone to make *statewide* public policy. The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.

Viking Properties, 155 Wn.2d at 129 (citations omitted). Because *Viking Properties* had little effect on the Growth Boards’ application of “bright-line” rules,⁴ our Supreme Court revisited this issue three years later in 2008,

⁴ One notable exception is a decision issued shortly after *Viking Properties*, where the Eastern Growth Board rejected the use of “bright line” rules.

holding that “a GMHB may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.” *Thurston County*, 164 Wn.2d at 359.

C. The KCCC Board Applied “Bright Line” Standards as a Presumption of Invalidity

Within a year of the decision in *Viking Properties*, the Eastern Growth Board resuscitated the “bright-line” rules under the guise of administrative precedent, and thereby established a presumption that certain densities do not comply with the GMA. While the Board’s post-*Viking Properties* decisions largely shied away from the phrase “bright-line rule,” the Board nonetheless applied substantive and procedural requirements that do not appear in the GMA, and that effectively limit local government’s discretion to plan for development in its rural and urban areas. The Growth Boards’ new

Thurston County, 164 Wn.2d at 359 n.21 (citing *Citizens For Good Governance v. Walla Walla County*, EWGMHB No. 05-1-0013, 2006 WL 2415825 (June 15, 2006)). In *Citizens For Good Governance*, the petitioners argued that the *Bremerton* minimum 4 dwellings per acres urban density “bright-line” rule prohibited Walla Walla County from permitting urban densities of 3 dwellings per acre. The Growth Board rejected the petitioners’ “bright-line” argument, explaining the “density factor may be lower than the petitioners would like to see and what the Central Board held in *Bremerton v. Kitsap County* as a ‘bright line’ rule, however, the Supreme Court in *Viking Properties, Inc. v. Holm*, opened the door to a variety of densities based in part on local circumstances.” *Citizens For Good Governance*, EWGMHB No. 05-1-0013, 2006 WL 2415825 at *11-12-. Applying the statutory standard of review, the Eastern Growth Board found that the petitioners failed to meet their burden of proof and dismissed their challenge. *Citizens For Good Governance*, EWGMHB No. 05-1-0013, 2006 WL 2415825 at *11-12.

requirements still subject certain densities to increased scrutiny.

In *Futurewise v. Pend Oreille County*, the Eastern Growth Board determined that prior decisions by all three Growth Boards created a presumption that certain densities are invalid under the GMA. See *Futurewise v. Pend Oreille County*, EWGMHB No. 05-1-0011 at 15-22, 2006 WL 3749673 (Nov. 1, 2006). Departing from the plain language of the GMA, the Board concluded that local government had only limited discretion to designate rural densities: “Counties and cities do have *some* discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record.” *Pend Oreille*, EWGMHB No. 05-1-0011 at 16, 2006 WL 3749673 (emphasis added). The Board concluded that it had the authority to determine what range of rural densities would be acceptable under the Act. *Pend Oreille*, EWGMHB No. 05-1-0011 at 16, 2006 WL 3749673. As a result, the Eastern Board concluded that any rural density more intense than those previously accepted by the Boards constitutes a departure from the goals and requirements of the GMA and must be “scrutinized more carefully” and “justified in the record.” *Pend Oreille*, EWGMHB No. 05-1-0011 at 16, 2006 WL 3749673.

To reach this conclusion, *Pend Oreille* relied on several decisions where the Board applied the maximum rural density standards established in *Bremerton* and its progeny. See *Pend Oreille*, EWGMHB No. 05-1-0011 at 16-18, 2006 WL 3749673. First, the Board cited *City of Moses Lake v. Grant*

County, EWGMHB 99-1-0016, 2000 WL 772910 (May 23, 2000), for the proposition that the designation of “5-acre lots in rural areas would be more difficult to justify” and “need to be scrutinized more carefully.”⁵ *Pend Oreille*, EWGMHB No. 05-1-0011 at 16. Next, the Board cited *Concerned Friends of Ferry County v. Ferry County*, EWGMHB No. 01-1-0019 (June 14, 2006), for the proposition that one dwelling per 5 acres is the maximum rural density permissible under the GMA. *Pend Oreille*, EWGMHB No. 05-1-0011 at 17. The Board then cited the remand order in *City of Moses Lake* as establishing a rule that local government planning decisions for rural areas were not due any deference if the densities were more intense than the Board’s previously approved rural densities. *Pend Oreille*, EWGMHB No. 05-1-0011 at 17. The Board bolstered its decision by relying on *City of Bonney Lake v. Pierce County*, CPSGMHB No. 05-3-0016c at 43-44, 2005 WL 2227905 (Aug. 4, 2005), where the Central Board adopted the *Bremerton*

⁵ *City of Moses Lake v. Grant County*, EWGMHB 99-1-0016, 2002 WL 32065599 (Apr. 17, 2002). The *Moses Lake* decision is recognized as an example of the Growth Boards’ pre-*Viking Properties* applications of a “bright-line” rule. See Henry McGee, Jr. & Brock Howell, *Washington’s Way II: The Burden of Enforcing Growth Boards in the Crucible of the Courts and Hearings Boards*, 31 Seattle U. L. Rev. 549, 575-76 (2008) (Arguing for a new application of the Growth Boards’ prior “bright-line rule” decisions as “advisory” opinions to guide future decision making. *Id.* at 589). Of course, this application would be equally infirm because the GMA specifically prohibits the Growth Boards from issuing advisory opinions. RCW 36.70A.290(1).

bright-line standard for delineating rural/urban densities.⁶ *Pend Oreille*, EWGMHB No. 05-1-0011 at 18. Based on its conclusion that any rural density more intense than one dwelling per 5 acres presumptively violates the GMA, *Pend Oreille* held the county to increased scrutiny, including the requirement that it develop a written record justifying its “departure” from the GMA, and as a result concluded that the County failed to meet the Board-created burden of proof to justify its rural designation. *Pend Oreille*, EWGMHB No. 05-1-0011 at 20-22.

The KCCC Board relied on *Pend Oreille* (which was the primary case cited by the petitioners) to frame the rural density challenge as follows: “Did Kittitas County’s failure to review and revise the comprehensive plan to eliminate densities greater than one dwelling unit per five acres in the rural area . . . violate [the GMA]?”⁷ KCCC, EWGMHB 07-1-0004c at 6. Without providing any explanation beyond the reasoning in *Pend Oreille*, the Board concluded that the County’s designation of one dwelling per 3 acre rural densities constitutes an urban density and “is prohibited in the Rural element.” KCCC, EWGMHB 07-1-0004c at 16. Based on this conclusion, the Board determined that the County was required to create a written record

⁶ See *Bonney Lake*, CPSGMHB No. 05-3-0016c at 43-44, n.26, 2005 WL 2227905.

⁷ In *Thurston County*, our Supreme Court found that the Growth Board implicitly adopted a “bright-line” rule by framing the issue in terms of whether the County had complied with a specific density standard. *Thurston County*, 164 Wn.2d at 358 n.20.

justifying its decision to include these rural densities in its plan update. *KCCC*, EWGMHB 07-1-0004c at 17. The Board upheld petitioners' challenge based on the County's failure to satisfy its Board-created burden of proof justifying its designation of certain rural densities. *KCCC*, EWGMHB 07-1-0004c at 17. The review employed by the Growth Board in this case is exactly what our Supreme Court rejected in *Thurston County*: "We hold a GMHB may not . . . subject certain densities to increased scrutiny." *Thurston County*, 164 Wn.2d at 359.

D. The Growth Boards' Continuing Application of "Bright-line" Rules Renders Local Planning Decisions Meaningless

The *KCCC* Board's application of a "bright-line" rule, violates the policy underlying the GMA. Indeed, one Member of the Central Growth Board recently criticized the Growth Boards' continued application of inflexible "bright-line" rules. In *Suquamish Tribe v. Kitsap County*, a majority of the Board applied a "bright-line" density rule to impose what the Central Board coined a "safe harbor" presumption of validity. *Suquamish*, CPSGMHB No. 07-3-0019c, 2007 WL 2694968, at *51 (Aug. 15, 2007). Under this "safe harbor" presumption, any density that falls within the Board's predisposed standards for compliance will be found valid, while densities that depart from the "bright-line" standard will be subject to increased scrutiny. *See Suquamish Tribe*, 2007 WL 2694968, at *51.

Responding to the automatic and uncritical nature in which the Board

had applied its density standards, Central Puget Sound Board Member Margaret Pageler dissented:

As I read the Supreme Court's opinion in *Viking Properties v. Holm*[], 155 Wn.2d 112 (2005), neither the Board nor the parties can take refuge in a 'bright line' urban density measure when cogent facts point in another direction.

Suquamish Tribe, 2007 WL 2694968, at *51. Board Member Pageler concluded that GMA's requirement that local government develop locally appropriate plans based on local circumstances is rendered "meaningless" if planning is based on "bright-line" rules and "doesn't have to be based in reality." *Suquamish Tribe*, 2207 WL 2694968, at *51.

This criticism of the Growth Boards' "bright-line" rules illustrates why this issue remains of paramount importance to the proper administration of the GMA. At the GMA's very foundation is the mandate providing local jurisdictions broad deference in planning decisions: The "GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Viking Properties*, 155 Wn.2d at 125-26; *see also* WAC 365-195-010(3) (The GMA "process should be a 'bottom up' effort . . . with the central locus of decision-making at the local level."). The Boards' continued application of "bright-line" rules undermines the Legislature's intent that local governments have the discretion to develop locally appropriate regulations "based in reality" (*i.e.*, local circumstances and balancing the various GMA goals).

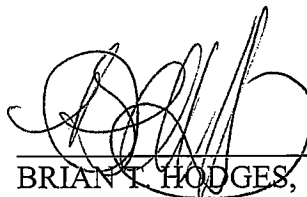
Moreover, as Board Member Pageler recognized, the application of such inflexible standards encourages local government (especially those governments bowing under the cost and pressures of GMA planning) to engage in “meaningless” planning whereby it opts for uniform, safe harbor density standards without regard to the realities of its local circumstances and the goals of the GMA.

CONCLUSION

The record here establishes that Kittitas County, acting in accordance with the discretion granted under the GMA, designated a variety of rural densities based on local circumstances and incorporated innovative techniques to preserve rural character. Applying its invalid “bright-line” standards, the Growth Board failed to grant Kittitas County the discretion and deference required by the GMA. The decision should be reversed.

DATED: July 15, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Hodges', is written over a horizontal line.

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